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UNITED STATES SUPREME COURT

OCTOBER TERM 1954

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MAC Q. WILLIAMSON, Attorney General, *et al.*,
Appellants,

vs.

LEE OPTICAL OF OKLAHOMA INC., a corporation, *et al.*

LEE OPTICAL OF OKLAHOMA INC., a corporation, *et al.*,
Appellants,

vs.

MAC Q. WILLIAMSON, Attorney General, *et al.*

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF IN SUPPORT THEREOF

AND

BRIEF ON BEHALF OF PENNSYLVANIA OPTICAL COMPANY, AS *AMICUS CURIAE*

HAMILTON HICKS,
Attorney for PENNSYLVANIA OPTICAL COMPANY, *Amicus Curiae*,
2 East 54th Street,
New York, N. Y.

HICKS & WELLER,
Of Counsel.

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MAC Q. WILLIAMSON, Attorney General, *et al.*

MOTION

Now Comes Pennsylvania Optical Company, a Pennsylvania corporation, and respectfully moves this Honorable Court for leave, through its attorney, to file a brief *amicus curiae* for the special reasons set forth in the accompanying brief in support of this motion.

Dated, New York,
February 4, 1955.

HAMILTON HICKS,
Attorney for PENNSYLVANIA OPTICAL COMPANY as *Amicus Curiae*,
2 East 54th Street,
New York, N. Y.

HICKS & WELLER,
Of Counsel.

BRIEF IN SUPPORT OF MOTION OF PENNSYLVANIA OPTICAL COMPANY TO FILE A BRIEF *AMICUS CURIAE*

Pennsylvania Optical Company manufactures ready-to-wear eyeglasses equipped with convex spherical (magnifying) lenses which are sold over-the-counter at retail stores to customers who make their own selections. Millions of such eyeglasses are sold annually in 44 states, under laws permitting their over-the-counter sale without prescription. Pennsylvania Optical Company has engaged in this business since 1886 and is the largest manufacturer of such articles in the United States.

These eyeglasses do not correct vision and have no effect, good or bad, on refractive error or pathological disorders. They clarify the image and are used extensively as reading glasses by middle-aged persons. In workmanship, material and quality, such eyeglasses compare with the best prescription glasses, but the retail cost runs from less than one dollar to about three dollars, according to style. They are harmless. Any individual may select a reading glass in the same way in which he chooses shoes, the difference being that an ill-fitting shoe can inflict damage, but a reading glass of the wrong strength has no harmful effect on the eye, nor on the pathology of the wearer (R. 100-101).

These magnifying glasses were not involved in this litigation. The suit was brought by dispensing opticians (who grind lenses prescribed by a physician or an optometrist, who is not a physician, R. 37, n. 3) to test the constitutionality of an Oklahoma statute which forbids opticians to duplicate prescription lenses and to replace such lenses in new frames without prescription. The Act expressly exempts from regulation the over-the-counter sale of magnifying lenses.

The District Court held that, since opticians are competent to duplicate prescription lenses and replace them in frames without prescription, the Act bears no reasonable relation to public health and is, therefore, an arbitrary

denial of the due process guaranteed by the Fourteenth Amendment. The Court went further, however, and assigned as a *principal* ground for striking down the pertinent provisions of the Act, the theory that there is no real difference between ready-to-wear magnifying glasses and prescription lenses and that "to regulate prescription eyeglasses * * * and yet expressly exempt ready-to-wear eyeglasses constitutes an unreasonable and discriminatory classification in contravention of the equal protection clause of the Fourteenth Amendment." (120 F. Supp. 128, at p. 139.)

By so holding, the court has, potentially, invalidated the optical laws of 44 states *without evidence in the record to support its conclusion that the exempted eyeglasses are identical with prescription eyeglasses* and it has virtually legislated out of existence an important industry useful to millions of people. Yet the case is one in which no member of that industry was involved. No qualified person was given the opportunity to fully present the evidence that the two classes of lenses are wholly distinguishable for regulatory purposes. By invoking the equality clause without foundation, the court violated a cardinal rule established by this Court that federal courts should not, by declaratory judgment, invalidate the exemptions, established by state legislatures *when any facts reasonably can be conceived to sustain them.*

> *State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527 (1931) at p. 537;
> *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450 (1945) at p. 471.

The foregoing facts and questions of law were not adequately presented by the parties below and are not likely to be presented adequately on these appeals, because:

1. The plaintiffs have no interest in the art and business of producing ready-to-wear convexspherical glasses and, since they benefit by the District Court's error in assuming that all eyeglasses are within the same category,

are not to be expected to advise this Court that the trial court erred, and

2. At the trial, the Attorney General introduced no evidence and made no argument relating to the matter of discrimination and the equal protection clause, stating that he thought that the exemption clause was not involved in this case (R. 194). Moreover, in his seventy-five page brief filed in this Court on this appeal, *the Attorney General has not argued the issue of the application of the equality clause, and has cited no cases on that point.* Furthermore, although the burden of advising this Court on this issue lies, primarily, with the Attorney General, he has refused the request of Pennsylvania Optical Company for consent to an appearance *amicus curiae.* Still further, his letter of refusal, (a copy of which is attached hereto) states that he has consented to the appearance *amici curiae* of Guild of Prescription Opticians and American Optometric Association. *These organizations will not advise this Court impartially in respect to the exemption clause covering ready-to-wear magnifying glasses because they are active in sponsoring before all state legislatures restrictive statutes regulating, and making economically unsaleable, ready-to-wear convexspherical glasses.* They oppose exemption clauses such as the one in the Oklahoma statute and American Optometric Association, at its recent convention, *pledged itself to press such opposition in the legislatures of 44 states.*[1]

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[1] Resolution adopted at June, 1954 Annual Congress of American Optometric Association, at Seattle, Wash.:

> "*Resolved*, that the American Optometric Association recommends to its affiliated state associations the desirability of causing the introduction of legislation to prevent the indiscriminate sale of ready-made eye glasses as merchandise so that the unsuspecting and unknowing public may be protected against the dangers which may flow through the use of these articles."

This resolution is published in the October, 1954 issue of "Guilderaft", the organ of Guild of Prescription Opticians of America, Inc.

It is, therefore, certain that unless this Court permits Pennsylvania Optical Company to file a brief *amicus curiae*, *none of the parties and amici curiae now before the Court will present the issue* and the Court, in what amounts to a virtual *ex parte* proceeding, will, by silence, be invited to affirm an erroneous ruling of the District Court which does violence to an important principle of constitutional law, and is capable of destroying an entire industry.

The industry which Pennsylvania Optical Company represents and the large segment of the public served by it are innocent bystanders whose interests face destruction because the trial court was confused by the general term "eyeglasses." Unless this Court expressly disavows the District Court's misapplication of the equality clause to optical goods, the effect of the error will be far reaching.

Pennsylvania Optical Company respectfully requests the opportunity to be heard on this important point.

Respectfully submitted,

HAMILTON HICKS,
Attorney for PENNSYLVANIA OPTICAL COMPANY as *Amicus Curiae*.

HICKS & WELLER,
Of Counsel.

(GREAT SEAL OF THE STATE OF OKLAHOMA 1907)

MAC Q. WILLIAMSON
Attorney General

STATE OF OKLAHOMA
OFFICE OF THE ATTORNEY GENERAL
OKLAHOMA CITY

February 2, 1955

MR. HAMILTON HICKS
Attorney at Law
2 East 54th Street
New York, New York

Dear Sir:

We have just received your telegram asking us to consent to the filing of a brief amicus curiae in the Lee Optical case by your client, Pennsylvania Optical Company.

This is to advise you that we have already agreed to the filing of a brief amicus curiae by the "Guild of Prescription Opticians," same being represented, we understand, by Stinson, Mag, Thomson, McEvers & Fizzell, 9 West 10th Street, Kansas City, Missouri. It is our understanding that the Guild will present the views of the optical companies. In consideration of our said agreement, Lee Optical has consented to the filing of a brief amicus curiae by the American Optometric Association, who are represented by Philip B. Perlman, Attorney, Suite 1021, Tower Building, 14th & K Streets, Washington 5, D. C. We suggest that the Pennsylvania Optical Company contact the Guild of Prescription Opticians as to the issues it desires presented in the Guild's amicus curiae brief.

We believe it would create confusion for a separate amicus curiae brief to be filed by the Pennsylvania Optical Company, and hence we respectfully decline to consent thereto.

We are mailing a copy of this letter to Stinson, Mag, Thomson, McEvers & Fizzell, and to their associate counsel, Duke Duvall, Liberty National Building, Oklahoma City, Oklahoma.

Yours very truly

FOR THE ATTORNEY GENERAL

FRED HANSEN

Fred Hansen
First Assistant Attorney General

FH:LW

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MAC Q. WILLIAMSON, Attorney General, *et al.*

BRIEF ON BEHALF OF PENNSYLVANIA OPTICAL COMPANY, AS *AMICUS CURIAE*

Statement of the Case

This is an action for a declaratory judgment construing Oklahoma House Bill No. 953[1] brought under the Federal Declaratory Judgment Act,[2] challenging the constitutionality of portions of the statute and for an injunction against their enforcement. The District Court held[3] that Section 2

[1] Title 59, Secs. 941-947, Oklahoma statutes, being an Act relating to visual care.

[2] 28 U. S. C. A., Secs. 2201, 2202.

[3] 120 F. Supp. 128.

is invalid in that it arbitrarily excludes opticians from fitting lenses and frames to the face and duplicating and placing in frames lenses which have been prescribed or are intended to aid human vision, in violation of the due process and equal protection[4] clauses of the Fourteenth Amendment. The court also held that sections 3 and 4 of the Act violate the due process clause by prohibiting the advertising of frames, mountings and other optical appliances (Sec. 3) and by forbidding the practice of visual care in retail stores (Sec. 4). The District Court coupled its declaratory judgment with injunctive relief. The Attorney General appeals from the entire judgment (No. 184). The plaintiffs, who are dispensing opticians, appeal from the judgment in that it fails to declare the prohibition in Section 3 against advertising eyeglasses invalid under Article I, Section 8, of the Constitution and the equal protection and due process clauses of the Fourteenth Amendment thereto (No. 185).

The Interest of Pennsylvania Optical Company as *Amicus Curiae*

Pennsylvania Optical Company, as *amicus curiae,* submits that the District Court erred by including the equal protection clause as a principal ground for invalidating parts of Section 2. The *amicus curiae* supports the contention of plaintiffs that the section is unconstitutional, but only because it contravenes the due process clause. The District Court, however, said that the exemption of sellers of ready-to-wear glasses is a defect "of even more significance" than the objections to the Act under the due process clause (120 F. Supp. at p. 138). The application of the equality clause to Section 2 may foreclose substantial rights of the public and of Pennsylvania Optical Company in respect to a class of optical goods not directly involved in this case. Those goods consist of ready-to-wear glasses equipped with convexspherical lenses which Penn-

[4] The *Amicus Curiae* is concerned only with the application of the equality clause to this case.

sylvania Optical Company has manufactured in quantity[5] since 1886, sun glasses and industrial glasses with plano lenses.

The conclusion that Section 2 violates the equality clause is based on a misapprehension of the subject matter of the exemption provision in Section 3 of the statute. The trial court's misconception led it to formulate a doctrine that will plague an important industry and millions of people who require its products, unless disavowed by this Court.[6]

The lower court placed the sale of the exempted goods in the same class, from the standpoint of public health, as the fitting of frames and lenses and duplicating of prescription lenses. The exempted ready-to-wear convexspherical lenses are, however, common magnifying glasses. By classifying such goods with prescription lenses, the District Court has, in effect, made a predetermination which will invite regulatory measures designed to place ordinary magnifying glasses beyond the financial reach of a large segment of the public. It is no answer to say that such regulations, if arbitrary, will fall when challenged. Should the highest Court rule that, as to the police power, magnifying lenses and prescription lenses are alike, restrictions which may reasonably be applied to the latter may be accepted by the lower courts as applicable to the former; evidence of what, in reality, is reasonable for a particular

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[5] Over 300,000,000, sold in 44 states under laws similar to the Oklahoma statute in that they recognize the distinction between convexspherical lenses and prescription eyeglasses and permit the over-the-counter sale of the former, or go further and permit the sale of all eyeglasses as merchandise.

[6] The District Court said (120 F. Supp. at p. 139): "If it be desirable for the public protection that opticians sell merchandise and service only upon written prescriptive authority, the legislature cannot at the same time permit the unsupervised sale of ready-to-wear (convex spherical lenses) eyeglasses."

lens may succumb to the artificial judicial doctrine that all lenses are the same.

The erroneous classification is not only unsupported by the evidence; it is contradicted by the meager proof received on that subject. The goods exempted by the Act were not involved in this controversy. The classification originates in semantic confusion similar to that underlying the zoological blunder celebrated by the anecdote of Ellis Parker Butler.[7]

All eyeglasses are not eyeglasses within the meaning of the equal protection clause of the Fourteenth Amendment. Lenses vary in their impact on the public health. Although the error in classification may not affect the parties to this suit, still it may decide the general question, and so anticipate a final decision involving non-participants. *Robinson* v. *Lee*, 122 F. 1010 (C. C. D. S. C., 1903), c. c. 196 U. S. 64. If, in sustaining the result reached by the District Court this Court will rectify the fallacy which impairs it, an unwarranted predetermination of the rights of others will be avoided.

POINT I

The Oklahoma statute exempts the over-the-counter sale of optical goods which differ substantially from the articles which are regulated.

The Act[8] provides that nothing therein:

> "* * * shall prohibit the sale of ready-to-wear glasses equipped with convexspherical lenses nor sunglasses equipped with plano lenses nor industrial glasses and goggles with plano lenses used for industrial eye protection when sold as merchandise at

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[7] "Pigs is Pigs", by Ellis Parker Butler, Doubleday & Co., Inc., 1952.

[8] 59 Okla. St. Ann. Secs. 941-947.

> any established place of business and where the selection of the glasses is at the discretion of the purchaser'' (Sec. 3, R. 39).

Glasses equipped with convexspherical lenses are ordinary magnifying glasses which do not correct vision, except that they magnify (R. 81, 193). They are not fitted, or adapted to the patient's face. The user selects them himself. No prescription is involved, nor is a prescription required because, as plaintiffs' expert witness, Dr. Coston, testified (R. 100-101), they are reading glasses of a type which anyone may have occasion to use, and they do no harm whatever. They are sometimes called ''dime-store'' glasses (R. 81, 100), although the description is anachronistic. As Dr. Coston said, they are cheap glasses with enough (magnifying) power to help people who need a reading glass. Such a person may, by going down the counter, select a glass which magnifies sufficiently to enable him to read (R. 100).

It is common knowledge that, with most people, the focus of the normal eye changes with age so that, although the vision is unimpaired, close reading becomes difficult. People of middle age conventionally describe this familiar condition by observing that their eyes are alright but their arms are too short (R. 159). A magnifying, or ''plus'', lens permits such persons to read comfortably. The pocket magnifying glass used by some to read the telephone book in a dark booth, or to examine fine print, is a convexspherical lens.

When such lenses are placed in spectacle frames, so that the object observed by each eye is magnified, the lenses are of equal power. They are not ground to accommodate the divergent refractive or therapeutic requirements of each eye (R. 81), as is the case with prescription lenses. There is no need for such adaptation, since the magnifying glasses do not correct optical defects nor treat disorders of the eye. Prescription lenses, on the other hand, may be ground cylindrically to correct the astigmatic error of

either eye, or prismatically to counterbalance muscular imbalance of the eyes (R. 94-95). Lenses ground according to prescription may be fitted, or adapted, to the face by a specialist (R. 73; 78-80). Convexspherical lenses are not (R. 81).

Prescription lenses are the result of a professional examination of the eyes for pathology or refraction. 122 F. Supp. at p. 134. If the diagnosis reveals a pathological condition, the lenses prescribed may be related to the therapy used for the treatment of the disorder, even though the lens itself has no curative power (R. 387). Since such lenses are the result of a professional diagnosis, their character should not be altered by the intervention of unskilled persons. It is beside the point that a wrong prescription will not damage the eye (R. 92, 104, 108, 113, 153, 329-330, 387, 446, 452-453), and that the use of self-selected convexspherical lenses is not injurious. The point is that, when a person receives a professional examination resulting in an optical prescription related to a pathological condition or to refractive error, he is entitled to the continued benefits of that prescription. The fact that a wrong prescription will not hurt the patient does not mean that the right prescription may not help him. Consequently, one who wears prescription lenses is situated differently, from the health aspect, from one who has purchased magnifying spectacles at a store. The former has a lens that reflects the professional judgment of a specialist, while the latter has a magnifying glass which has no attributes beyond the capacity to enlarge, or clarify, an image. The patient with the prescription lens is entitled to protection against activities which may bring about a deviation from the prescription. The purchaser of the magnifying glass needs no such protection.

The purchaser of the prescription lens has a continuing stake in the preservation of the benefits of the professional skill incorporated in the prescription. The purchaser of the magnifying glass has none. In his case, no question of

"duplication" is involved; if he breaks his spectacles, he buys another pair.

The Oklahoma statute purports to protect wearers of prescription lenses from activities which might vary the prescription. The fact that the method selected by the Legislature was unrealistic, and that prescription lenses may be duplicated mechanically or placed in new frames without distortion, does not diminish the difference between such lenses and convexspherical glasses selected by the wearer. The prescription lens continues to be the product of professional skill exercised in relation to the unique pathological or refractive needs of a particular individual. The prescription lens is personal in its application and purpose. The ready-to-wear magnifying glass is general; it resembles the binocular or telescopic rifle sight in that it is not built to the measurements of any individual but is designed for the use of all who find it serviceable.

POINT II

In a declaratory judgment proceeding, the federal courts will assume that the legislature was warranted in excluding certain activities from the application of a regulatory statute. When any facts reasonably can be conceived to sustain an exemption, this Court will not disturb it.

The record in the case at bar contains no evidence that the exemption clause is arbitrary. On the contrary, all of the evidence touching the subject is the other way. Plaintiffs argued briefly to the District Court that Section 2 was invalid because of the exemption clause in Section 3 (Pltffs.' brief below, pp. 44-48) but made no reference to the testimony beyond the assertion that there is no difference between the *effect* of identical convexspherical lenses whether prescribed or purchased ready-to-wear, and that all types of lenses are alike in that they are harmless. That

contention overlooks the fact that the wearer of prescribed lenses has a beneficial interest in the professional advice represented by the prescription, a condition which does not accompany the use of ready-to-wear spectacles (Point I, *supra*), nor does it dispose of the point that the only lens excluded is the simple magnifying glass, while the restrictions apply to all lens forms used in prescription work, including prismatic, cylindrical, bifocal, toric, contact, multifocal, etc. That a physician or optometrist may, in some cases, prescribe simple convexspherical lenses, or no glasses whatever, for patients who require little or no visual care or optical correction, does not invalidate the distinction drawn by the Legislature. The fact that physicians occasionally prescribe bread tablets would not invalidate a law regulating medicines which excluded bread.

The regulations found by the District Court to be arbitrary succumb to the due process clause, not the equality clause. If lenses are harmless whether prescribed or sold over the counter, the regulation is void because it is unrelated to health. The question of equality becomes academic, and it is sophistry to assert, in such a case, that because an article, under different conditions of use, is harmless in either case, an attempt to regulate one harmless use is void because it does not extend to the other.

Had there been any foundation for the Legislature's concern that the fitting and duplicating of lenses without a prescription at hand might endanger public health, the exemption of ready-to-wear magnifying glasses would still be reasonable. Even the absence of evidence establishing the purpose of the exclusion would not vitiate it.

In *Wampler* v. *Lecompte*, 282 U. S. 172 (1930), this Court said at pp. 174 *et seq:*

> "Nor is the equality clause violated by the special provisions that in certain inland waters blinds need not be placed farther apart than 250 yards.[9]

[9] The Maryland Conservation law required a 500 yard distance between duck blinds except in the case of riparian owners.

> The state court, relying upon *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78, said: 'Why these provisions were inserted in the statute we are not informed, but we may assume, until the contrary is shown, that a state of facts in respect thereto existed which warranted the legislature in so legislating.' • • • This long-settled rule disposes also of the alleged discrimination created by the special exemptions applicable to certain other waters of the State."

And in *Packer Corporation* v. *Utah*,[10] 285 U. S. 105, (1932) this Court said at p. 110:

> "The legislature may recognize degrees of evil and adapt its legislation accordingly."

In *San Francisco Shopping News Co.* v. *City of South San Francisco*, 69 F. (2d) 879 (C. C. A., 9th Circ. 1934), certiorari denied, 293 U. S. 606, the court held that an ordinance prohibiting the distribution of an advertising "newspaper" which exempted newspapers publishing general news and advertising was not discriminatory, relying in part on the following statement of the California Supreme Court (69 F. (2d) at p. 884) in *Re Cardinal*, 170 Cal. 519:

> "The question of classification is primarily one for the legislative power, to be determined by it in the light of its knowledge of all the circumstances and requirements, the presumption in the courts is in favor of the fairness and correctness of the determination by the legislative department, and the courts are not privileged to overturn that determination *unless they can plainly see that the same was without warrant in the facts.*" (Emphasis supplied)

As was said in the opinion of the majority of the Justices in *State Board of Tax Commissioners* v. *Jackson*, 283

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[10] Upholding a Utah statute prohibiting billboard cigarette advertising but permitting such advertising in newspapers and periodicals.

U. S. 527 (1931), a very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses or occupations subjected to special regulation or taxation.

Of course, the mere fact that convexspherical lenses are "eyeglasses" is no criterion. Mr. Justice Holmes said, in *Dominion Hotel* v. *Arizona*,[11] 249 U. S. 265 (1919), at p. 268:

> "The Fourteenth Amendment is not a pedagogical requirement of the impractical. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way."

In *Polhemus* v. *American Medical Association*,[12] 145 F. (2d) 357 (C. C. A. 10th Circ. 1944) the court said at p. 359:

> "The matter of classification (of branches of the healing art) is for the state Legislature and cannot be interfered with by a federal court in the absence of a clear showing that the adopted classification is unwarranted and unreasonable."

And Mr. Justice Frankfurter said in *Tigner* v. *Texas*,[13] 310 U. S. 141 (1940) at p. 147:

> "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."

In *Goesaert* v. *Cleary*, 335 U. S. 464 (1948) a majority of the Justices held that the equality clause was not violated

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[11] Exemption of railroad restaurants from the Arizona Hours of Labor for Women Statute, held valid.

[12] Naturopathic physicians were excluded from the benefits of the "Grandfather clause" of the New Mexico Basic Science law.

[13] Upholding Texas anti-monopoly law which exempted producers of livestock and agricultural products from its penal provisions, overruling *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

by the Michigan law forbidding women to be barmaids except the wives and daughters of male tavern owners.

The basis for the distinction in the Louisiana Pilots' case was decidedly narrow, but the statute was upheld by a divided Court. *Kotch* v. *Board of River Port Pilot Commissioners*, 330 U. S. 552 (1947).

POINT III

The District Court overstepped the salutory rule of restraint against striking down state statutes in actions for declaratory judgments.

In *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450 (1945), Chief Justice Stone said, at p. 471:

> "It would be an abuse of discretion for this Court to make a pronouncement on the constitutionality of a state statute before it plainly appeared that the necessity for it had arisen, or when the Court is left in uncertainty, which it cannot authoritatively resolve, as to the meaning of the statute when applied to any particular state of facts. In any event the parties are free to litigate in the state courts the validity of the statute when actually applied to any definite state of facts, with the right of appellate review in this Court. In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy *it is of controlling significance that it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes.* See *Great Lakes Co.* v. *Huffman, supra*,[14] 300, et seq." (Emphasis supplied.)

This Court declined to invalidate the statute which was attacked under the equality clause because it exempted certain labor unions and business corporations from the

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[14] 319 U. S. 293 (1943).

general requirement that labor unions file certain statements.

In the case at bar, the District Court has virtually foreclosed state action in respect to regulations exempting or regulating convexspherical lenses by observing, among other things, that the sale of ready-to-wear convexspherical lenses "doubtless is more perilous" than the acts forbidden by the statute,[15] although the only evidence on the subject is the testimony of plaintiffs' expert to the effect that the sale of such glasses does no harm whatever (R. 101) and the statements of the Attorney General that the exclusion is reasonable (R. 81, 193).

The gratuitous appraisal of the supposed danger in the unrestricted sale of glasses equipped with convexspherical lenses may have been predicated on the decisions in *Roschen* v. *Ward*, 279 U. S. 337 (1929), and *Commonwealth* v. *S. S. Kresge Co.*, 267 Mass. 145, 166 N. E. 558 (1929). Neither decision, however, is determinative of any *facts* whatever relating to the possibility of harm in the sale over the counter of magnifying glasses.

The *Roschen* case affirmed the decision of the District Court in *Kresge* v. *Ottinger*, 29 F. (2d) 762, which involved a motion for a preliminary injunction against the enforcement of a New York statute [16] prohibiting the sale of eyeglasses for the correction of vision unless a physician or optometrist is in charge of the booth where the glasses are sold. The complainants, who were engaged in the sale of ready-to-wear convexspherical glasses, presented no professional testimony or evidence regarding the effect of such eyeglasses on the wearer. They limited their objection to the argument that the regulation had no substantial relation to public health because the specialist required to be present was not obliged to examine or prescribe (p. 765, and 279 U. S. at p. 339). Judge Hand (A. N.) said that this did

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[15] 120 F. Supp. at p. 139.

[16] Ch. 379, Laws of 1928; Education Law, Sec. 1432-a.

not show that the supervision was not a step in the public interest and that, although magnifying spectacles were alleged by the complainants to be harmless, others might not limit their sales to such glasses (pp. 764-765). The case has no bearing on the factual question of whether or not convexspherical lenses are properly classifiable with prescription lenses, or the duplication thereof, from the standpoint of public health. The decision turned solely on the insufficiency of the contention that the regulation was ineffective; the facts regarding convexspherical lenses were not established and were not involved in the result. The same is true of *Commonwealth* v. *Kresge, supra,* which concerned the application of a regulatory law to a defendant who sold "spectacles and eyeglasses designed to fit varying defects of vision" (267 Mass. at p. 147) rather than mere magnifying glasses.

These decisions provide no factual basis for a declaratory judgment holding that the sale of magnifying glasses involves dangers indistinguishable from, or greater than, those incident to the duplication of prescription lenses or their replacement in frames.

One of the reasons advanced by Judge Hand in support of the validity of the restriction placed by the New York statute on the sale of ready-to-wear magnifying glasses was that, if the economic effect of the restriction should be to cause customers to buy prescription glasses instead of the ready made variety, "it cannot be said that the result might not on the whole be desirable * * *" (29 F. (2d) at p. 764). Such reasoning is appropriate when a court seeks to justify the *presence* of a restriction in a statute, but it has no application to the instant case which involves the *absence* of restriction. In weighing the constitutional effect of the *absence* of restriction, it is the function of a federal court to assume that there was a valid reason for the exclusion and to uphold it "if any state of facts reasonably can be conceived to sustain it." *State Board of Tax Commissioners* v. *Jackson* (*supra*), 283 U. S. 527 at p. 537, also citing *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89.

The District Court acted at large in speculating that the distinction drawn by the Oklahoma Legislature was illusory. Speculation as to the purpose of a classification may be indulged in to uphold a statute, but not to defeat it. It is, for example, reasonable to assume that the legislative purpose in regulating the act of fitting prescription glasses to the face and not regulating the *sale* of ready-to-wear magnifying glasses as merchandise *where the selection of the glasses is at the discretion of the purchaser,* was that the person who performs the act of adjusting spectacles to the face of another may hold himself out as possessing technical or professional skill, and the patient should be protected from misrepresentation in that regard, but in the case of self-selected spectacles no person other than the purchaser himself does the fitting and there is no necessity for protecting him from deception on the part of the fitter. This hypothesis is supported by the fact that the statute is so worded that anyone who undertakes to fit *to the face of another person,* ready-to-wear convexspherical glasses sold over the counter, must possess the stipulated qualifications. There is no discrimination under the Act when one person adapts glasses to the face of another, regardless of the type of lens involved; the exemption clause operates only when the purchaser fits magnifying glasses to his own face.

Conclusion

Although the judgment of the District Court should be affirmed, this Court should overrule that part of the opinion below which applies the equal protection clause to the Oklahoma Act.

The statement of the trial court (120 F. Supp. at p. 139) that, if it be desirable for the public protection that opticians sell merchandise and service only upon written prescription, the legislature may not permit the unsupervised sale of ready-to-wear convexspherical eyeglasses, throws doubt upon the validity of the optometry laws of at least 44 states which regulate the practice of visual care but do

not substantially restrict the sale of eyeglasses as merchandise.[17]

The opinion below will, unless expressly disavowed, predetermine actions in state courts involving similar statutes and may destroy the industry of which the *amicus curiae* is a part by engendering arbitrary laws too numerous to be combated by the slow and costly process of interpretive litigation. Unless it is corrected on this appeal, the opinion below will

> "be recorded for a precedent; And many an error, by the same example Will rush into the state."
>
> (*Merchant of Venice*)[18]

Respectfully submitted,

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Of Counsel.

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[17] For example, the Washington Optometry Law (Laws of 1919, ch. 144, as amended) defines the practice of optometry as "in any manner" adapting lenses "to the human eye for any purpose either directly or indirectly" (Sec. 1) but exempts merchants who sell eyeglasses as merchandise "without pretense of adapting them to the eyes of the purchaser" (Sec. 15).

The Maryland Optometry Law (Ch. 652, Vol. 3, Art. 43, Acts of 1914, as amended) contains somewhat similar provisions in Secs. 358 and 369.

The Virginia Optometry Law (Code of Va. Laws, as amended) prohibits the sale of eyeglasses without prescription (subd. 10 of Sec. 54-396) but permits the "sale of spectacles and eyeglasses * * * as merchandise" in stores (Sec. 54-369).

Note that, in these statutes, the exemption is broader than the clause condemned in the instant case which is limited to ready-to-wear self-selected convexspherical glasses.

[18] See "*Stare Decisis*", by W. O. Douglas, 49 Col. Law Rev. 735 at p. 747.